



22 CFR Part 120

[Public Notice: 11406]

RIN 1400-AF17

International Traffic in Arms Regulations: Regular Employee

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to update the definition of regular employee to allow subject persons to work remotely, and to clarify the contractual relationships that meet the definition of regular employee.

DATES: Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may submit comments by one of the following methods:

- *Email:* DDTCPublicComments@state.gov, with the subject line “ITAR Amendment: Regular Employee”
- *Internet:* At www.regulations.gov, search for this document using Docket DOS-2021-0009.

Comments received after the acceptance date may be considered if feasible. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted. Comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at www.pmddtc.state.gov. Parties who wish to comment anonymously may submit comments via www.regulations.gov, leaving identifying fields blank.

FOR FURTHER INFORMATION CONTACT: Ms. Engda Wubneh, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663-1809; e-mail *DDTCCustomerService@state.gov*. ATTN: Regulatory Change, ITAR Section 120.39: Regular Employee.

SUPPLEMENTARY INFORMATION: In March 2020, the President declared a national emergency as a result of the COVID-19 pandemic. Subsequently, the Department announced a temporary suspension, modification, and exception through July 31, 2020, of the requirement that a regular employee, for purposes of ITAR § 120.39(a)(2), work at a company's facilities. The temporary measure allowed individuals to work remotely provided they are not located in Russia or a country listed in ITAR § 126.1 (85 FR 25287, May 1, 2020), and still be considered regular employees under the ITAR. The Department requested and received comments regarding the efficacy and duration of this temporary measure (85 FR 35376, June 10, 2020). Many commenters, one industry association, and several individual entities endorsed the telework provisions and requested that this measure be effective until the end of the year, if not extended indefinitely. Additionally, many commenters mentioned that this temporary measure allowed industry to continue their business activities despite COVID-19 as many employees could work remotely. In response, this temporary measure was extended until December 31, 2020 (85 FR 45513, July 29, 2020).

The Department is proposing to amend ITAR § 120.39 permanently to allow certain individuals to work remotely, and further proposes to clarify the contractual relationships that meet the definition of regular employee. The Department recognizes that the workplace environment is evolving, therefore, the current "regular employee" criterion that an individual must work at a company's facilities will be removed in the revised definition to allow for remote work. The Department also proposes to set forth clear criteria that will allow regulated entities to treat certain contractual staff as regular employees for the purposes of the ITAR, provided

those individuals are sufficiently subject to the employer's control such that the Department can hold the regulated employer responsible for the individual's actions.

Further, the Department proposes to codify the meaning of a "long term contractual relationship" in ITAR § 120.39(a)(2) by clarifying in the regulations that individuals must be providing services to an entity under a contract for a term of one year or more (ITAR § 120.39(a)(2)(i)). The goal of this provision is to minimize the risk of diversion of U.S. defense articles. The delineation of a contract for one year or more was selected in part based on the Department's expectation that a long-term contractor will receive superior orientation and training from a regulated entity upon onboarding, and the ability to absorb and apply training materials and adhere to compliance policies and procedures (e.g., ITAR-related training) is more likely to occur with at least a year of experience on the job. For those individuals not in a "long term contractual relationship" with a regulated entity (i.e., where the contract is less than one year), the Department will allow such individuals to be treated as regular employees provided that, in addition to the control and non-disclosure considerations described in ITAR § 120.39(a)(3), the individual also maintains an active security clearance approved by the United States or by the government of the entity to which the individual's services are provided. Lastly, although employment type is not explicitly referenced in the definition, individuals providing services pursuant to a contractual relationship can include independent contractors, seconded employees, individuals provided by a staffing agency, or contractors provided by a contracting agency.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA), pursuant to 5 U.S.C. 553(a)(1).

Since the Department is of the opinion that this rule is exempt from 5 U.S.C 553, it is the view of the Department that the provisions of Section 553(d) do not apply to this rulemaking.

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment provisions of 5 U.S.C. 553(b), it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). This rule's scope does not impose additional regulatory requirements or obligations; therefore, the Department believes costs associated with

this rule will be minimal. Although the Department cannot determine based on available data how many fewer licenses will be submitted as a result of this rule, the amendment to the definition will inherently relieve the licensing burden for any exporter utilizing it in a qualifying scenario. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action” by the Office and Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 120

Arms and munitions, Classified information, Exports.

For the reasons set forth above, title 22, chapter I, subchapter M, part 120 of the Code of Federal Regulations is proposed to be amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105-261, 112 Stat. 1920; Pub. L. 111-266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Section 120.39 is revised to read as follows:

§120.39 Regular employee.

(a) *Regular employee* means:

(1) An individual permanently and directly employed by an entity; or

(2) An individual providing services to an entity:

(i) Under a contract with a term of one year or more;

(ii) Who works under the entity's direction and control;

(iii) Who works full time for the entity;

(iv) Who is subject to the entity's compliance policies and procedures; and

(v) Who executes a nondisclosure agreement with the entity that provides assurances that the individual will not transfer any defense articles to persons or entities unless specifically authorized by the entity; or

(3) An individual providing services to an entity:

(i) Under a contract with a term of less than one year;

(ii) Who maintains an active security clearance approved by the United States or by the government of the entity to which the individual is providing services;

(iii) Who works under the entity's direction and control;

(iv) Who works full time for the entity;

(v) Who is subject to the entity's compliance policies and procedures; and

(vi) Who executes a nondisclosure agreement with the entity that provides assurances that the individual will not transfer any defense articles to persons or entities unless specifically authorized by the entity.

(4) A secondment from one entity to another meets the definitions described in paragraphs (a)(2) and (3) of this section.

(b) Nothing in this section shall be construed to provide authorization for the export, retransfer, or reexport of defense articles or defense services.

Choo S Kang,

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Bureau of International Security and Nonproliferation,

Department of State.

Billing Code: 4710-25

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